IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-801

FLORA DAUN FOWLER, *Plaintiff-Appellant*

v.

MARYLAND STATE BOARD OF LAW EXAMINERS,
Defendant-Respondent

JURISDICTIONAL STATEMENT

FLORA DAUN FOWLER
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Seabrook, Maryland 20801

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JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of Maryland as finally determined by denial of Appellant's Motion for Reconsideration and Motion for an Order for Answer, Discovery, and Hearing in an order made on the 7th day of September, 1977, subsequent to an order made on the 13th day of July overruling Appellant's Exceptions to Grading of Bar Examination Answers. Appellant submits this Statement to show that the Supreme Court of the

United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The judgment of the Court of Appeals of Maryland was entered in the form of orders overruling Appellant's Exceptions on July 13 , 1977 and in denying the Appellant's Motions for Reconsideration and for an Order for Answer, Discovery and Hearing,on September 7, 1977. These decisions are not reported. There are no opinions. Copies of the orders are in Appendix A and Appendix B, attached hereto.

JURISDICTION

This action was begun, in accordance with the Rules Governing Admission to the Bar of Maryland, when Appellant questioned her grades on the February 1977 bar examination which caused the Board of Law Examiners to refuse her recommendation for admission to the Maryland bar and thereby deprived her of a license to practice law in that State.

The order overruling Appellant's Exceptions was made on July 13, 1977. Appellant's motion for reconsideration and her motion requesting an order for an answer from the Board,as well as discovery and a hearing,were denied on September 7, 1977.

Appellant filed the notice of appeal in the Court of Appeals of Maryland on October 7, 1977. Appendix C.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2).

If this Court shall determine that direct appeal was improvidently taken, it may nonetheless treat this appeal as an application for a writ of certiorari as provided in 28 U.S.C. 2103 and, as so treated, such writ should be granted.

CONSTITUTIONAL PROVISIONS, STATUTES AND COURT RULES INVOLVED

The federal constitutional provisions involved in this appeal are found in the United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory and court rule provisions involved are found in the Annotated Code of Maryland, Volume 9A, Rules Governing Admis-

sion to the Bar of Maryland, Rule 8b and Rule 12b.

Rule 8b: Review Procedure

1. Board's Test - Written Request

If after a failure a candidate desires to review his examination books and the model answers for the Board's test, he must file a written request for such a review within sixty (60) days after the date of mailing to him, at his last known address on file with the Board, notice of his failure. Failure to timely file shall be deemed a waiver of the right of review provided by this subsection.

2. M.B.E. Test - Written Request

If after a failure a candidate desires a confirmation of his correct MBE test score, he may file with the Board a request, in accordance with the Board's rules and regulations as to procedure and costs, for such confirmation. No other review of the MBE test will be provided.

3. Review by Court of Appeals - Exceptions

Exceptions seeking a review by the Court of Appeals of the candidate's answers to the Board's test shall be filed within the time required by section b of Rule 12 (Procedure Following Report to the Court). The exceptions shall be accompanied by a statement indicating (i) that the candidate availed himself of the opportunity to review his examination books and the model answers for the Board's test, and (ii) shall specify those questions and answers which the candidate wishes reviewed and the reasons therefor. No hearing will be held but the Court shall determine the matter by reviewing the candidate's examination answers to the questions specified and, in addition, the Court may in its discretion review the candidate's entire examination answers to the Board's test.

Rule 12: Procedure Following Report to Court

a. Order of Ratification

Upon receipt of the Board's report, filed pursuant to Rule 11 (Examination Result -Report), the Court shall pass an order fixing a day at least thirty (30) days after the filing of the report for ratification of the Board's recommendations. The order shall contain the names and places of residence of all persons recommended for admission by the Board and shall be published at least one time in the Maryland Register before ratification of the Board's recommendations. The order shall include the names of those persons conditionally recommended under Rule 11 (Examination Results-Report) and a general statement of the condition without naming the persons to whom it applies. (7-1-75)

b. Exceptions - Time For

Exceptions to the Board's recommendation of or failure to recommend any candidate may be filed with the Court on or before the

day fixed for ratification of the report. For cause shown the Court may permit the filing thereafter, and before the candidate's admission to the Bar, exceptions relating to any relevant matter other than the candidate's success or failure on the bar examination. Where the exception relates to moral character or any relevant matter other than the candidate's success or failure on the examination, he exceptant and the candidate shall have the right to produce evidence in support of or against the exception before the Court or before an Examiner appointed to take testimony and the Court shall thereupon in such manner as it may determine, finally adjudicate the matter. (3-12-73)

c. Ratification of Order

Upon expiration of the time fixed in the order provided for in section a, the Board's report and recommendations shall be ratified subject to the conditions stated therein and

and exceptions under section b.

Rule 8b is on page 674 of Volume 9A of the Annotated Code of Maryland; Rule 12 is on page 675.

Article 10, Section 1, of the Annotated Code of Maryland:

No person, except as provided in Section 14A of Article 27 of the Annotated Code, shall practice the profession or perform the services of an attorney-at-law within this State without being admitted to the bar as hereinafter directed.....

Rule 7c of the Rules Governing Admission to the Bar of Maryland:

c. Policy

It is the policy of the Court that no quota of successful candidates be set, but that, insofar as practicable, each candidate be judged upon his fitness to be a member of the bar as demonstrated by his examination answers. To this end the examination shall be designed to test the candidate's knowledge of legal principles in the sub-

jects in which he is examined and his ability to recognize, analyze and intelligibly discuss legal problems and to apply his knowledge in reasoning their solution. The examination will not be designed primarily to test information, memory or experience. (Page 672, Volume 9A, Annotated Code of Maryland)

Rule 7f. Notice of Grades

Successful candidates need be notified only that they passed. Unsuccessful candidates shall be given their grades in such detail as the Board may deem practical. (Page 673, Volume 9A, Annotated Code of Maryland)

QUESTIONS PRESENTED

Appellant took the Maryland bar examination two times, once in July of 1976 and once in February of 1977. On the basis of her answers she was not recommended for admission to the bar of Maryland by the Board

of Law Examiners and was thereby denied a license to practice law in the State of Maryland. Notification of failure consisted of a statement to that effect,and with the numerical value assessed to each of the six parts of the essay portion of the examination and the total value calculated. See Appendix D attached. Appellant then followed the Rules Governing Admission to the Bar of Maryland in seeking review of her answers. She was given an appointment to see her own examination books,which were unmarked and ungraded, and to see the Board's model answers to the questions. One hour was allowed for such review with no opportunity for questioning the allotment of points for the grading as stated on the notification of failure. Appellant filed exceptions pursuant to the rules. The exceptions were overruled without the requested hearing and without an opinion. Appellant filed motions for reconsideration and for an order for answer,

discovery and a hearing. Both motions were denied by the Court of Appeals of Maryland.

1. Whether Rule 8b,of the Rules Governing Admission to the Bar of Maryland,which provides a review procedure for candidates, who have failed the bar examination and not been recommended for admission,but does not afford notice of reasons for failure and does not afford a hearing,is violative of and repugnant to the due process clause of the first section of the Fourteenth Amendment of the United States Constitution, where such denial deprives the candidate of the right to practice law.

2. Whether Rule 12b,of the Rules Governing Admission to the Bar of Maryland, which grants a hearing to a candidate where his character is in question,but does not grant a hearing to a candidate where his competency, as measured by his answers to bar examination questions,is in question, is violative of and repugnant to the equal protection clause of the first section of the

Fourteenth Amendment of the United States Constitution.

3. Whether Appellant whose right to practice law has been denied, in accordance with the Rules Governing Admission to the Bar of Maryland, without proper notice or a hearing, has been denied due process and equal protection of the law under the first section of the Fourteenth Amendment of the United States Constitution.

STATEMENT

In the State of Maryland no person shall practice the profession of law within the State without being admitted to the bar. Article 10, Section 1, Annotated Code of Maryland.

When it has been determined by the Court that a candidate is qualified to practice law and is of good moral character, an order shall be passed directing that he be admitted to the Bar. Article 10, Section 10,

Annotated Code of Maryland.

The Board (of Law Examiners) shall as soon as practicable after each bar examination, report to the Court all of the Board's proceedings in connection with such examination and shall recommend in the case of each person examined that he be or be not admitted to the Bar. Rule 11, Rules Governing Admission to the Bar of Maryland, page 675, Volume 9A, Annotated Code of Maryland.

The Appellant, Flora Daun Fowler, having received her juris doctor degree in May of 1976, proceeded to take the bar examination for Maryland in July, 1976. In November, 1976 she was notified that she had failed the examination and would not be recommended for admission to the Maryland Bar.

On February 22 and 23, 1977 she took the Maryland bar examination for the second time. On May 12, 1977 she was again notified that she had failed and would not be recommended for admission to the Maryland Bar.

After the first failure she had requested review pursuant to Rule 8b(1) of the Rules Governing Admission to the Bar of Maryland. She had been given an appointed time to go to the Board's offices. There she was handed her examination books, ungraded and unmarked in any way, just as she had turned them in at the end of the examination for the essay portion of the examination. She was allowed to read the answers written by the Board as models but could not copy the answers for later study. She was allowed to take notes during the hour alloted for the review. No members of the Board were present. There was no opportunity for questioning the results. Other candidates were in the room reviewing their own examinations and silence was maintained. Copies of representative good answers were made available for purchase.

After the second failure in February, 1977 Appellant filed exceptions (including

a supplement entitled an addendum) pursuant to Rule 8b(3) after she had requested and utilized the review procedure under Rule 8b(1) under the same conditions as described for review of the July, 1976 examination. Appendix E.

Appellant's exceptions raised serious questions regarding the manner of grading her bar examination books and the possibility of mistake in such grading. She had calculated that only fourteen more points had been needed for her passing and she demonstrated how she believed she had earned 35.5 more points than she had been credited. When Appellant filed her exceptions she had served a copy upon the Board of Law Examiners. The Board did not answer. On July 13, 1977 the Court of Appeals of Maryland, without a hearing and without an opinion, made an order overruling Appellant's exceptions. There was no further procedure under the Rules Governing Admission to the Bar of

Maryland for an appeal. Appellant filed a motion for reconsideration on August 12, 1977, pursuant to Rule 850 of the Maryland Rules of Procedure. Volume 9B, Annotated Code of Maryland, page 633. At the same time she filed a motion for an order for an answer, discovery and a hearing together with a statement of points and authorities in support of both motions. The latter motion was made pursuant to Rule 855(a) of the Maryland Rules of Procedure, Volume 9B, Annotated Code of Maryland, page 634. Copies of both motions and of the statement were served upon the Board.

Again there was no answer. The Court of Appeals in an order made on September 7, 1977 denied both motions, without a hearing and without an opinion. Appendix B.

On October 7, 1977 Appellant filed notice of appeal to the United States Supreme Court in the Court of Appeals of Maryland.

How The Federal Question Is Presented

Appellant first raised the federal question in her exceptions to the grading of her bar examination answers, filed on June 13, 1977. This was the first opportunity for raising any questions. In her addendum to the exceptions, filed on June 16, 1977, the questions were re-asserted. The federal questions were the basis for the motion for reconsideration and the motion for an order for answer, discovery and hearing. Appendix F, Appendix G, Appendix H.

On November 18, 1977 Appellant was admitted to the Florida Bar. However, her residence for the past thirty-six years has been, and remains, in the State of Maryland.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The due process question raised in this appeal is similar to that issue involved in Schware v. Board of Bar Examiners of New

Mexico, 353 U.S. 232 and in Willner v.Committee on Character and Fitness, 373 U.S. 96; but in this present appeal, rules of court, having the effect of statutes, have been drawn into question as being violative of and repugnant to the first section of the Fourth Amendment of the United States Constitution in regard to due process and equal protection as well.

The issues herein are important to all candidates for the legal profession, to the administrative agencies which test and grade such candidates, and to the judiciary which has exclusive control over admissions to the bar and who make the rules governing those admissions.

In Rules Governing Admissions to the Bar of Maryland, the State, through the highest court therein, the Court of Appeals of Maryland, has provided a review procedure, for one group of bar candidates, which falls far short of the concept of due

process, and has provided a review proced - ure for another group of candidates from which the others are excluded, thereby denying the equal protection of the law.

On the same day on which Appellant filed her notice of appeal to the United States Supreme Court in the Court of Appeals of Maryland, the Court of Appeals repealed Rule 8b(3) of Rules Governing Admission to the Bar, such repeal to become effective on January 1, 1978. Rule 8b(3) allows exceptions to be taken to the Court of Appeals in regard to the candidate's bar examination answers. The reasons for such repeal are not based on the constitutionality of the rule. The Court has "determined that it is neither necessary nor desirable that it actively engage in a review or regrading process with respect to bar examination essay answers and has concluded that the provisions of subsection 3 of Rule 8b should be repealed----------. Appendix I.

However, Rule 4c has not been repealed. Rule 4 (Appendix J) provides for a character committee with the function of investigating each candidate for admission and making recommendations "as to the applicant's character, fitness and standing to be admitted to the Bar ---------."

If the recommendation is against admission, the Committee's report shall set forth the facts upon which the adverse recommendation is based and its reasons for rendering an adverse recommendation.

Rule 4c provides that where the Board concludes there exist proper grounds for disapproval,the applicant shall be promptly notified, given an opportunity to appear before the Board and be fully informed of the matters reported and to answer or explain. Thereafter if the Board's recommendation to the Court is against admission, unless the applicant withdraws, the Court shall require him to show cause why his ap-

plication should not be denied.

Whereas the Court will now withdraw from active participation concerning bar examination answers,the Court will continue to participate actively where one's character is in question.

Rule 12 was also not repealed. (pages 6-8 herein) Rule 12b provides the right to produce evidence before the Court or an appointed Examiner,and provides for the final adjudication by the Court where exceptions relate to"moral character or any relevant matter other than the candidate's success or failure on the examination".

RULE 8b,OF THE COURT'S RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND,IS VIOLATIVE OF THE DUE PROCESS REQUIREMENTS OF THE FIRST SECTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION,WHERE PURSUANT TO ITS PROVISIONS A PERSON IS DENIED A LICENSE TO PRACTICE LAW, WITHOUT PROPER NOTICE OR A HEARING.

The Court of Appeals of Maryland's order overruling Appellant's Exceptions without a hearing, and the Court's denial of the Appellant's motion for reconsideration and motion for an order for answer, discovery and hearing, in effect, upheld the validity and constitutionality of Rule 8 and Rule 12 of the Rules Governing Admission to the Bar of Maryland.

Appellant had raised the federal question in her Exceptions to Grading of Bar Examination, in her Addendum to Exceptions, in her Motion for Reconsideration, in her Motion for an Order for An Answer, Discovery and Hearing, and in her Statement of Points and Authorities in Support of both motions.

The Court's Rules Governing Admission to the Bar of Maryland are considered statutes for the purposes of Title 28, United States Code, Section 1257(2), Lathrop v. Donohue, 367 U.S. 820, because they regulate the admissions to the legal profession.

Since Appellant's challenge to the rules was explicit, the Court's failure to pass on the federal constitutional objections to the statute which Appellant raised should be treated as equivalent to a finding of validity within the meaning of Section 1257 (2) so that this appeal will be held appropriate. Lawrence v. State Tax Commission, 286 U.S. 276, 282-3.

The Court of Appeals of Maryland has provided certain review procedures for unrecommended candidates for admission to the Maryland Bar.

Where the candidate questions the grading of his essay examination, under Rule 8b (1) he has the right to request an opportunity to review, for a period of one hour, on a given date, his own examination answers and the Board's model answers.

Under Rule 8b(3) the candidate has been entitled to review of his answers by the Court of Appeals after he had inspected his

own answers and the Board's model answers and after he had specified the questions and answers he wished reviewed, giving the reasons therefor. This section of the rule states that no hearing will be held, that the matter will be determined by the Court by reviewing the answers.

The examination answers reviewed by the candidate and by the Court are unmarked and ungraded, the points assessed to each part of the examination are listed on a separate sheet of paper with no explanation as to how the result was determined. There is no indication at all on the examination books as to how or where the points were calculated by the grader. The examination books are as unmarked as when they were handed in to the examiners after the test.

The essay examination lasted all day. To reread one's own answers and to effectively study and take notes from the Board's model answers for a six-hour long test would

require more than an hour. Yet the candidate is allowed only that one hour in which to compare his own answers to those of the Board's and to speculate as to how the grader assessed the given number of points to each section of his examination. Although the candidate is not able to purchase a copy of the Board's model answers, he may purchase a copy of representative good answers of other candidates, with two such answers for each examination question. He may also purchase a copy of his own examination answers.

At the time Appellant reviewed her answers and the Board's model answers, Rule 8b(3) was in effect. Exceptions to the Court of Appeals in regard to the Board's grading were allowed, but it was specifically stated that there was to be no hearing. There was no particular form in which the exceptions must be made. Appellant was advised by the Clerk's Office that the exceptions could be stated in a letter to the

Court. Appellant was also informed by the Clerk's Office that only seven exceptions had been taken to the February, 1977 essay examination.

The case was not assigned a case number. The Court's decision was in the form of an order overruling Appellant's Exceptions. No opinion was written, no reasons given for the adverse decision. Appellant's further motions were denied, also without opinion and without the requested hearing.

On the day Appellant filed her notice of appeal to the United States Supreme Court, the Court of Appeals repealed Rule 8b(3), effective January 1, 1978.

However, with or without subsection 8b (3), Rule 8b is nonetheless violative of federal due process provisions.

When the Board of Law Examiners recommends against admission to the Maryland Bar, the candidate is denied the right to practice law in the State of Maryland.

Where federal action is concerned:

> The right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the provisions of the Fifth Amendment to the Federal Constitution that no person shall be denied liberty or property without due process of law. Green v. McElroy, 360 U.S. 474, 79 S. Ct. 1400.

The Fourteenth Amendment protects liberty or property from state action lacking due process provisions.

In Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 the Court stated:

> A State cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process Clause of the Fourteenth Amendment. (pgs. 238-239)

> Even in applying permissible standards, officers of the State cannot exclude an applicant when there is no basis for their finding that he fails to meet those standards, or when their action is invidiously discriminatory. Schware, supra, pg 239.

In a disbarment case, the Court found that:

> This absence of fair notice as to the grievance procedure and the precise nature of the charges deprived petitioner of due process. (Emphasis added.) In re Ruffalo, 390 U.S. 544.

In Mullane v. Central Hanover Trust Company, 339 U.S. 306, the Court stated:

> Many controversies have raged about the cryptic and abstract words of the Due Process Clause but here can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded

> by notice and opportunity for hearing appropriate to the nature of the case.

The nature of notice and hearing was elaborated upon in the case of Hornsby v. Allen, 326 F. 2d 605.

> Due process in administrative proceedings of a judicial nature generally requires conformance to fair practices of Anglo-Saxon jurisprudence, and this is equally equated with adequate notice and fair hearing - requirements that parties be allowed opportunity to know opposing parties' claims, to present evidence to support their contentions, and to cross-examine opposing parties' witnesses, but strict adherence to common law rules of evidence at hearing is not required.

In the case of Willner v. Committee on Character and Fitness, 373 U.S. 96, the petition-

er was denied admission to the bar of New York because of an adverse report by a committee of lawyers appointed by the Appellate Division to investigate and report on the character and fitness of the applicants. In the State Court of Appeals petitioner contended that he had never been given an opportunity to confront his accusers and cross-examine them and that he could not be sure of the committee's reasons for refusing to certify him for admission. The Court of Appeals affirmed the order of the Appellate Division without an opinion. The Court held that petitioner was denied procedural due process when he was denied admission to the bar without a hearing before either the committee or the Appellate Division.

> The requirements of procedural due process must be met before a State can exclude a person from practicing law. Willner, supra, pg 102.

> Procedural due process often requires confrontation and cross-examination of those whose word deprives a person of his livelihood.
>
> Petitioner was clearly entitled to notice and a hearing on the grounds for his rejection either before the committee or before the Appellate Division.

The cases which have come before the Court in the past involved the character or fitness of the bar applicants but not their proficiency in the law or their competency to practice, as based upon the results of written examinations.

Appellant contends that candidates for the bar who are rejected because of their bar examination answers to the essay questions are entitled to due process as well as those who are rejected for reasons relating to their character.

When high school students were temporarily suspended for misconduct for up to ten

days, the Supreme Court of the United States held that the statute which permitted such suspension was unconstitutional, as were the implementating regulations, because suspensions were made without hearing prior to suspension or within a reasonable time thereafter. Goss v. Lopez , 419 U.S. 565.

The Court, in Goss stated:

> The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently rely on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of

> error is not trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

The same could be said for the manner of grading essay answers on a bar examination. The process is not "totally accurate and unerring, never mistaken and never unfair". The controlling facts and the nature of the questions asked are subject to dispute and the "risk of error is not trivial".

In the manner of its notice to the unsuccessful candidates the Board lists only empty numerals with no relevant meaning. In the manner of its review, using unmarked examination books, unevaluated model answers, and severely limited time, it gives no notice of the reasons for its determination of failure. It acts arbitrarily in allowing copying and purchase of the representative good answers but disallowing copying and purchase of the Board's model answers.

> Administrative convenience or necessity cannot override due process requirements. Russell-Newman Mfg. Co. v. N.L.R.B., 370 F. 2d 980

The Court of Appeal's review procedure in Rule 8b of Rules Governing Admission to the Bar of Maryland is lacking in due process provisions.

RULE 12b, OF THE RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND, IS VIOLATIVE OF THE EQUAL PROTECTION PROVISIONS OF THE FIRST SECTION OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION WHERE IT PROVIDES A HEARING FOR A CANDIDATE WHEN HIS CHARACTER IS IN QUESTION BUT PRECLUDES A HEARING FOR A CANDIDATE WHEN HIS COMPETENCY, AS MEASURED BY HIS BAR EXAMINATION ANSWERS, IS IN QUESTION.

Appellant has challenged the constitutionality of Rule 12b which provides an opportun-

ity to introduce evidence and to have testimony taken when the moral character of the candidate is in question, but does not provide the same opportunity to the candidate whose fitness to practice law, as determined by his answers on the bar examination, is in question.

In Mayer v. City of Chicago, 404 U.S. 189, a state supreme court rule which made a distinction between felony and nonfelony offences was "unreasoned and proscribed by the Fourteenth Amendment".

In Groppi v. Wisconsin, 400 U.S. 505, a rule which permitted a change of venue in felony but not in nonfelony trials was held violative of the Equal Protection Clause.

The Fourteenth Amendment demands that a state treat all citizens alike, unless there is a sufficient reason to treat them differently. The concept of equal protection has been traditionally viewed as requiring uniform treatment of persons standing in the same relation to the action of government.

The Equal Protection Clause requires that state laws be applied uniformly to situations which cannot be reasonably distinguished.

The Court's Rule 12b makes an unreasonable distinction between candidates denied admission for different reasons.

Rule 4c which precedes Rule 12b sets out provisions for hearing by the Board of Law Examiners and review by the Court for those candidates rejected because of the report of the Character Committee. No similar committee is provided for competency questions or investigation, nor is there a means of hearing by the Board and review by the Court provided in such instances. Appendix J.

In being precluded from the privileges in Rule 12b and provisions of Rule 4, the candidates who question the bar exam results under Rule 8b are subjected to the inequality of rules which make no allowance for discovery, confrontation and cross-examination. Thus such candidates who are litigants

are further set apart from litigants in other actions and are receiving treatment which is not equal to that in ordinary legal actions, doubly violating the equal protection provisions of the United States Constitution.

Because the Court of Appeals has exclusive control over attorneys and exclusive control over admissions to the bar in Maryland, other avenues of relief are blockaded and other procedural devices precluded.

The candidates are all members of the same class, all applicants for admission to the bar of Maryland. The effect of a rejection is the same, whether it be on grounds of character or competency in the law (or lack of such qualities). There is no rational basis for granting one group due process and denying due process to the other, thereby violating the Equal Protection Clause.

APPELLANT, FLORA DAUN FOWLER, HAS BEEN DENIED THE RIGHT TO PRACTICE LAW IN THE STATE OF MARYLAND AND, IN ACCORDANCE WITH THE RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND AND IN SPITE OF HER REQUESTS FOR ADEQUATE NOTICE AND A HEARING, HAS BEEN DENIED SUCH RIGHT WITHOUT DUE PROCESS OR EQUAL PROTECTION OF THE LAWS.

Appellant, as described in the Statement herein, questioned the results in the grading of her essay examination for the Maryland Bar. She passed the Multistate Bar Examination with a score which was subsequently accepted by the State of Florida without retaking the M.B.E. in that State. On November 18, 1977 she was admitted to the Florida Bar. Her residence,however, remains in Maryland.

Without any further notice than the notification of her failure and the points relating to each part with the total percentage, and without a hearing, though one was requested, Appellant was denied the

right to practice law in the State of Maryland where she resides.

The United States Supreme Court determined in Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232 and in Willner v. Committee on Character and Fitness , 373 U.S. 96, that a person cannot be excluded from the practice of law in a manner or for reasons which contravene the Due Process Clause of the Fourteenth Amendment; that procedural due process often requires confrontation and cross- examination of those whose "word deprives a person of his livelihood"; and that the parties in those cases were clearly entitled to notice and a hearing on the grounds for rejection either before the committee or the court.

Rejections in Schware and Willner had been grounded on character. Now Appellant is calling upon this Court to decide that rejections regarding competency also require due process and equal protection of

the laws. Where a State sets out review procedures for candidates questioning their failures on the bar examination (the essay portion), those procedures should measure up to the requirements for due process and they should not be formulated in such a manner as to deny equal protection to any members of a particular class. Candidates who follow procedures lacking in such requirements are denied due process and equal protection thereby as has Appellant, Flora Daun Fowler.

Rule 7c of the Rules Governing Admission to the Bar states: -------insofar as practicable, each candidate be judged upon his fitness to be a member of the bar as demonstrated by his examination answers." (page 9 herein)

The grading of the essay answers is as subject to human error as are judgments of character. Appellant questioned the constitutionality of the manner of grading in her Statement of Points and Authorities.

The method which may appear constitutional on its face may be grossly discriminatory in its application. An examinee is entitled to be evaluated equally with other examinees. This cannot be accomplished in an essay test where one examinee's answers are evaluated by one grader at one time and another examinee's answers are graded by a different grader at a different time, when the calculation of point evaluation may vary from grader to grader. Success or failure may depend not so much on what a candidate says in his answers but upon which grader made the point calculations. The grading process is further unequalized by being extended over a long period of time. Unless one grader passes judgment on all the answers in a given category and within a reasonable time, there is no equality in the results.

Where the Board's model answers are the sole criteria for allowing points to evaluate an individual's fitness to practice law,

a mechanical application of a formula occurs.

> The requirements of due process cannot be ascertained by the mechanical application of a formula. Groppi v. Leslie, 404 U.S. 496.

A certain amount of personal discretion is vested in the hands of the grader, in interpreting the candidate's answers in relation to the model answers. It is this personal discretion which creates an inequality where answers to the same questions are left to different graders or at different times. This is no classroom where an instructor applies the same standards to each examination book.

Practicality should never override constitutionality.

This applies also to Rule 7f of the Rules Governing Admission to the Bar which states:"Unsuccessful candidates shall be given their grades in such detail as the Board may deem practical."(page 10 herein)

Appellant had valid reasons for challenging the grading of her essay examination answers,but because of the particulars outlined herein concerning the Rules Governing Admission to the Bar of Maryland, she had been deprived of a license to practice law without due process or equal protection, in violation of the Fourteenth Amendment of the United States Constitution.

The errors described herein can be rectified only by action of this Court.

CONCLUSION

For the reasons set forth in this Jurisdictional Statement, the questions presented herein, being substantial and of public importance, should be heard and decided on this appeal.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE MATTER OF THE EXCEPTION OF:	In The
FLORA DAUN FOWLER :	Court of
TO THE REPORT OF THE STATE BOARD :	Appeals
OF LAW EXAMINERS :	of
	Maryland

ORDER

The exception of Flora Daun Fowler to the Report of the State Board of Law Examiners for failure of the said Board to recommend her admission to the Bar of Maryland, and her answers to questions propounded at the examination given by said Board on February 22 and 23, 1977, having been considered, it is, this 13th day of July, 1977,

ORDERED, by the Court of Appeals of Maryland, that said exception be , and it is hereby, overruled.

/s/ Robert C. Murphy

Chief Judge

APPENDIX B

ORDER

Upon consideration of the motion for reconsideration filed in the above entitled matter, it is, this 7th day of September, 1977,

ORDERED, by the Court of Appeals of Maryland, that the motion be, and it is hereby, denied.

/s/Robert C. Murphy

Chief Judge

COURT OF APPEALS OF MARYLAND

September 15, 1977

Dear Mrs. Fowler:

You asked whether the Court had ruled on your motion for hearing filed with your motion for reconsideration on August 12, 1977.

The Court by considering and denying the motion for reconsideration without a hearing indicates, of course, that your motion for a hearing was not granted.

Sincerely yours,

James H. Norris,Jr.

Clerk

APPENDIX C

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Flora Daun Fowler, appellant above-named, hereby appeals to the Supreme Court of the United States from the final order of the Court of Appeals of Maryland, which order denied appellant's (1) Motion for Reconsideration and (2) Motion for an Order for an Answer, Discovery, and a Hearing; such order thereby affirming the Court of Appeals' earlier Order of July 13, 1977 overruling the appellant's Exceptions to the report of the State Board of Law Examiners; that final Order having been entered on September 7, 1977.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

Flora Daun Fowler
9410 Woodberry St.
Seabrook, Maryland 20801
(301) 577-2417

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of October, 1977, a copy of the Notice of Appeal to the Supreme Court of the United States was mailed postage prepaid to the Maryland State Board of Law Examiners, Appellee herein, at the Doner Building, 93 Main Street, Annapolis, Maryland 21401. I further certify that all the parties required to be served have been served.

_____

Flora Daun Fowler
Pro Se
9410 Woodberry Street
Seabrook, Maryland
20801
(301- 577- 2417

APPENDIX D

MARYLAND STATE BOARD OF LAW EXAMINERS
The District Court Building
P.O.Box 1911
Annapolis, Maryland 21404
Telephone: 301-269-2140

May 12, 1977

EXAMINATION GIVEN February 22, 23, 1977

EXAMINATION NO.
CANDIDATE 339 - Fowler, Flora Daun

We regret to advise that you failed to pass the bar examination given on the above dates. Accordingly you will not be recommended to the Court of Appeals of Maryland for admission to the bar.

Your scores are as follows:

Multistate Bar Examination		Board's Test (Score on basis of 300	
Subject	Number Correct		
Constitutional Law	12	Part A	33.0
Contracts	23	Part B	40.0
Criminal Law	19	Part C	29.0
Evidence	18	Part D	27.5
Real Property	21	Part E	27.0
Torts	27	Part F	39.5
TOTAL	120		196.0
*Scaled Score	126	which equals	65.3%

MBE scaled score as adjusted
by Method 1 . 59.235%

Combined score under Board
Rule 2 e 1 (ii) 62.268%

In order to pass this examination, it was necessary to attain either -

(i) a score of at least 70% on the Board's Test and at least 55% on the MBE test or

(ii) a combined score of at least 70%

Your attention is called to Rules 8 and 12 enclosed herewith.

/s/John E. Boerner
John E. Boerner
Secretary

* A scaled score is the score on a test when the raw score obtained has been converted to a number on a standard reference scale. The purpose of converting scores to a scale is to make reported scores as independent as possible of the particular form of a test an examinee has taken and of the composition of the candidate group at a particular administration. MBE scaled scores will range from 0 to 200 and a scale score of 150 is intended to indicate the same level of ability from year to year. The raw score of an applicant for the MBE might be reported as 140, whereas his or her scale score might be reported as 145 or 135.

APPENDIX E

MARYLAND STATE BOARD OF LAW EXAMINERS
The District Court Building
Third floor
P.O. Box 1911
Annapolis, Maryland 21404
Telephone: 269-2140

June 1, 1977

Ms. Flora Daun Fowler
9410 Woodberry Street
Seabrook, MD 20801

Dear Ms. Fowler:

Re: February, 1977 Examination

Your request for permission to compare your answers with the model answers for the above-mentioned examination has been received.

The following time has been reserved for you:

6/7/77 9 a.m. Third floor, The District Court Building (near intersection of Rowe Blvd. and Taylor Avenue) Annapolis, Maryland

In order that all requests may be handled as promptly as possible, it will be necessary that each applicant be limited to the specific

one-hour period, unless it is possible to allow more time.

Because of the number of requests and the facilities for this purpose, it will be necessary that only the applicant can be present during the review.

You will be furnished with the file copy of the notice of the bar result and a set of the model answers. Since the duplicate notice will be returned at the end of the review, you may wish to bring the original copy of the notice for the purpose of making any notes you wish.

Handwritten notes may be made from the model answers but you may not copy the entire answer.

The administrative detail and the supervision of the review will be handled by Mrs. Dorothy E. Pugh of this office.

Very truly yours,

/s/John E. Loerner
John E. Loerner
Secretary

JEL/dp
See attached "Note"

NOTICE

This is to advise that after review of your examination books and the model answers pursuant to Rule 8b., you may avail yourself of an additional review procedure if you so desire.

You may order (purchase) xerox copies of all or part of your own essay answers on this examination along with a set of (xerox copies) of two (2) representative good answers to each question on the examination. These are answers of other candidates taking this examination which have been selected by the graders as being good and well written answers but not necessarily perfect.

The cost for purchasing this material will be at the rate of five cents (.05) per page plus a postage and handling charge of seventy-five cents (.75).

If copies are desired please see Mrs. Pugh immediately following your review to advise on the number of pages you wish to order.

Payment must be made in advance by check or money order only, payable to State Treasury Office.

APPENDIX F

IN THE

COURT OF APPEALS OF MARYLAND

FLORA DAUN FOWLER,

Appellant

v.

MARYLAND STATE BOARD OF LAW EXAMINERS,

Appellee

EXCEPTIONS TO GRADING
OF BAR EXAMINATION ANSWERS

---

* * *

Petitioner further requests a hearing in the event that the Court rules against her contentions herein, pursuant to Rule 8b(3). A hearing is made available under Rule 12b where "moral character or any relevant matter other than the candidate's success or failure on the bar examination" is brought into question.

Petitioner contends that the blanket exclusion of such a hearing where it

relates to the examination results is violative of the equal protection clause of the 14th Amendment of the United States Constitution. Unavailability of a hearing also denies due process of law.

By using "minimal competency" as a measure for passing, one's reputation as an aspiring or prospective attorney is drawn into question. Repeated failures would thus indicate "incompetence to practice law", a stigmatized status one should be allowed to contest, and where the party should be allowed to confront those who have determined that status and to be informed of how such a determination was made. Anything less would be lack of due process.

Reputation has been categorized as a "liberty" for due process purposes. (Wisconsin v. Constantineau, 1971)

Where a license was required by law, the Court found that the agency was required to afford notice and conduct a hearing to lawfully determine which facilities, in that instance, should be approved and certified. New York Pathological and X-ray Laboratories, Inc. v. Immigration and Naturalization Service, 523 F. 2d 79, C.A. N.Y. 1975, 2d Circuit.

* * *

/s/Flora Daun Fowler
Flora Daun Fowler
9410 Woodberry St.
Seabrook, Md. 20801
(301) 577-2417

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Exceptions to Grading of Bar Examination Answers has been mailed, postage prepaid, to the Maryland State Board of Law Examiners, the District Court Building, Annapolis, Maryland 21404, this 13th day of June, 1977.

/s/Flora Daun Fowler
Flora Daun Fowler

APPENDIX G

IN THE
COURT OF APPEALS OF MARYLAND

FLORA DAUN FOWLER

Appellant

v.

MARYLAND STATE BOARD OF LAW EXAMINERS,

Appellee

MOTION FOR RECONSIDERATION

To the Honorable Judges of the Court of Appeals of Maryland:

Pursuant to Rule 850(a) of the Maryland Rules of Procedure, Flora Daun Fowler, Appellant herein, moves this Court to reconsider her Exceptions to Grading of Bar Examination Answers, filed on June 13, 1977, together with the Addendum to Exceptions, filed on June 16, 1977; such Exceptions having been overruled by this Court on July 13, 1977. The Exceptions relate to the Board's portion of the bar examination which was given on February 22, 1977.

Appellant requests reconsideration for the following reasons:

1. The State of Maryland through its Board of Law Examiners and through its highest court, the Court of Appeals, has deprived Appellant of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution, by denying her the right to practice law, her chosen profession, in the State of Maryland; such denial having been made without giving Appellant adequate reasons for such denial, without a hearing, and without an opportunity to make use of discovery and cross-examination, as in other adversary proceedings.

(a) The Board of Law Examiners, upon Appellant's request according to Rule 8(b) of the Board's Rules, presented an unmarked copy of Appellant's answers for review and purchase, with no indication thereon as to the correctness or error or inadequacy of

her answers and no assessment of the points given for such answers, and with such a brief time allowed to review and attempt to compare her own answers with the model answers that it precluded adequate notice of the reasons for her failure by means of comparison, particularly since there were no indications on the model answers as to the value given to the "points" included therein. Unlike the candidate's own answers and the Representative Good Answers, the model answers were unavailable for purchase to be examined properly.

Although Appellant raised serious questions regarding the Board's grading of her examination in the Exceptions filed, the Board did not answer, did not contest Appellant's assertions, and offered no explanation of their refusal to recommend Appellant for admission to the bar in light of Appellant's contentions.

(b) This Court, without an answer from the Board of Law Examiners, without a hearing, and without an opinion stating its reasons, overruled the Exceptions filed by the Appellant and served on the Appellee.

2. The method of review set forth in Rule 8(b), Rules of the Board of the State Board of Law Examiners (quoted in the Statement of Points and Authorities accompanying this motion) is violative of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Such rule has the force and effect of a statute of the State. The rule does not give proper and adequate notice, to examinees who question the examination results, of reasons for the denial of recommendation for admission to the State's bar based on the examination answers, where the grading conditions and timing are such as to be susceptible to human error and mistake, and are by no means

infallible. The review procedure in Rule 8(b) does not permit a hearing, as required by due process provisions. The Court reviews, upon request by Exceptions, and makes a decision without giving reasons therefor, and without responding to questions raised by the candidate.

3. Under Rule 12(b) of the Board's Rules "where the exception relates to moral character or any relevant matter other than the candidate's success or failure on the examination, the exceptant and the candidate shall have the right to produce evidence in support of or against the exception before the Court or before and Examiner appointed to take testimony and the Court shall thereupon, in such manner as it may determine, finally adjudicate the matter". This rule is violative of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States because it provides unequal treatment for persons

similarly situated, those persons who have been denied admission to the bar of Maryland. It discriminates by providing procedural means of challenge for those candidates where moral character is at issue and precludes the same means for those candidates where proficiency in law is at issue.

4. The method of seeking review under the Board's Rule 8(b) precludes the use of deposition and discovery procedures which are available to parties in other adversary proceedings in Maryland, and which deposition and discovery procedures, according to Maryland Rule 400(a), apply to <u>all</u> actions. By precluding the use of discovery, the rule, as applied, discriminates against candidates for admission to the bar, and the rule is thereby violative of the equal protection provisions of the Fourteenth Amendment.

5. The method of review by the Court under Rule 8(b)(3) has, over the years, exhibited a discriminatory pattern in favor

of the Board of Law Examiners as against contesting examinees, demonstrating that the lack of due process has created scales of justice which are thereby weighted against the challenging examinees.

6. The Board's portion of the Maryland bar examination (the essay portion) is particularly susceptible to grading which is discretionary, not by a single standard but by various standards, those individual judgments of various readers and graders. With only three members of the Board of Law Examiners and examination booklets numbering into the hundreds for each bar examination, the Board is allowed to hire persons of varying abilities and qualifications to assist in grading the examination answers. Thus, different graders make discretionary judgments as to different answers to the same questions, which in effect, creates an inequality of grading which can be eliminated only by assuring that the same grader reads

and determines the point value for all of the answers to the same question, and within the relatively same time period. Anything less is violative of the Equal Protection Clause. Therefore, the Maryland bar examination, in the manner of grading of the essay portion, does not provide equal protection for all examinees in any given examination.

For all the foregoing reasons, Appellant, Flora Daun Fowler, moves this Court to reconsider the order overruling her Exceptions.

Simultaneously with this Motion for Reconsideration, the Appellant is filing a Motion for an Order for an Answer, Discovery, and a Hearing and the form of the order requested, together with a single Statement of Points and Authorities in Support of said motions.

/s/Flora Daun Fowler
Flora Daun Fowler
9410 Woodberry Street
Seabrook, Maryland 20801
(301) 577-2417

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Reconsideration has been mailed, postage prepaid, to the Maryland State Board of Law Examiners, The Donner Building, 93 Main Street, Annapolis, Maryland 21401, this 12th day of August, 1977.

/s/Flora Daun Fowler
Flora Daun Fowler

APPENDIX H

IN THE
COURT OF APPEALS OF MARYLAND

FLORA DAUN FOWLER,

Appellant

v.

MARYLAND STATE BOARD OF EXAMINERS,

Appellee

MOTION FOR AN ORDER FOR AN ANSWER, DISCOVERY AND A HEARING

To the Honorable Judges of the Court of Appeals of Maryland:

Appellant, Flora Daun Fowler, moves this Court, under Rule 855(a) of the Maryland Rules of Procedure, to issue an order directed to the Maryland State Board of Law Examiners to compel the Board to answer to Appellant's Exceptions, to allow discovery by Appellant, and to conduct a hearing at which Appellant may introduce evidence and cross-examine members of the Board.

Appellant so moves because she has been deprived of the right to practice law in Maryland; such deprivation having been brought about without due process of law and in violation of the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

Filed simultaneously with this motion, Appellant has also moved for reconsideration of her Exceptions to Grading of Bar Examination Answers. The reasons listed in the Motion for Reconsideration apply equally to this Motion For an Order For an Answer, Discovery, and a Hearing, and those reasons are incorporated herein by reference and made a part hereof. The accompanying Statement of Points and Authorities in Support of Motion for Reconsideration and Motion for an Order for an Answer, Discovery, and a Hearing also applies to both motions and is incorporated into each motion.

/s/Flora Daun Fowler
Flora Daun Fowler

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for an Order for an Answer, Discovery, and a Hearing was mailed, postage prepaid, to the Maryland State Board of Law Examiners, The Donner Building, 93 Main Street, Annapolis, Maryland 21401, this 12th day of August, 1977.

/s/Flora Daun Fowler
Flora Daun Fowler
9410 Woodberry Street
Seabrook, Maryland 20801
(301) 577-2417

APPENDIX I

ORDERS AMENDING AND SUPPLEMENTING THE RULES GOVERNING ADMISSION TO THE BAR OF MARYLAND

WHEREAS, the Court has reviewed the provisions of Rule 8b3 of the Rules Governing Admission to the Bar of Maryland, pursuant to which failing candidates may, within a specified time, file exceptions to the grading process, and thereby require that the Court undertake to review and regrade all or part of the candidates' answers, and

WHEREAS, in no other jurisdiction is there a procedure which permits a failing candidate to have his examination answers reviewed and regraded, as a matter of right, by the highest appellate court of the state, and

WHEREAS, under the Maryland Rules, as well as by policy and procedure adopted and utilized by the Board of Law Examiners, all failing candidates are provided with the

opportunity to review their essay examination answers with the Board's model answers, and

WHEREAS, the Board has adopted a policy which permits a failing candidate, after availing himself of the opportunity of review under Rule 8b1, to obtain copies of his own answers and copies of two "representative good answers" selected by the graders, and

WHEREAS, the Board has followed a policy on each examination where, after the initial grading of the essay answers and before the grades are finalized for release, a range of review is established and the essay books of those candidates who fall within this range are regraded by the Examiners, and

WHEREAS, under the present Rules of the Court a failing candidate has extensive rights to take successive examinations, subject only to a condition

which the Board might impose of requiring the candidate to return to law school for additional study in specified courses,

NOW, THEREFORE, the Court has determined that it is neither necessary nor desirable that it actively engage in a review or re-grading process with respect to bar examination essay answers and has concluded that the provisions of subsection 3 of Rule 8b should be repealed; therefore, it is, this 7th day of October, 1977,

ORDERED, by the Court of Appeals of Maryland, that Rule 8b3 (Taking Examination After Failure - Review Procedures - Review Procedure- Review by Court of Appeals-Exceptions) of the Rules Governing Admis - sion to the Bar of Maryland be, and it is hereby, repealed, effective January 1, 1978.

Robert C. Murphy
Marvin H. Smith
J. Dudley Digges
Irving A. Levine
John C. Eldridge
Charles E. Orth, Jr.

APPENDIX J

RULE 4. CHARACTER COMMITTEE

a. Appointment - Terms

****

b. Investigation and Report

****

c. Hearing by Board - Review by Court

Should the Board because of matters reported to it by the Committee or for any other reason, conclude in the case of any applicant that there apparently exist proper grounds for disapproval of his application, it shall promptly notify the applicant and give him an opportunity to appear before it and be fully informed of the matters reported by the Committee and to answer or explain the same. If the Board is thereafter of the opinion that an adverse report should be made on the application, it shall first give the applicant the privilege of withdrawing his application, but if the applicant elects not to do so and the recommendation of the Board to the

Court is against approval of the application, the Court shall require the applicant to show cause why his application should not be denied; but if the Board shall recommend to the Court that the applicant is entitled to be registered as a candidate for admission and the Committee should desire to have such recommendation reviewed, the Committee may within thirty (30) days after notice of the Board's recommendation, and upon notice to the applicant file exceptions with the Court to the Board's recommendation. Proceedings in Court under this section shall be heard by the Court upon the records made by the Character Committee and the Board.

d. Continuing Review

The Committee shall continue to have under observation and subject to their further report all applicants up to the day set for Bar admission.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77 - 801

FLORA DAUN FOWLER, *Appellant*

v.

MARYLAND STATE BOARD OF LAW EXAMINERS,

Appellee

SUPPLEMENTAL BRIEF

FLORA DAUN FOWLER
9410 Woodberry Street
Seabrook, Maryland 20801

IN THE SUPREME COURT OF THE

UNITED STATES

FLORA DAUN FOWLER,

Appellant

v.

MARYLAND STATE BOARD OF LAW EXAMINERS,

Appellee

SUPPLEMENTAL BRIEF

In accordance with Rule 16(5) of the Rules of the Supreme Court of the United States, Appellant calls to the attention of this Court the case of Richardson v. McFadden, 540 F. 2d. 744, in which a petition for writ of certiorari was very recently docketed and which will soon be before this Court.

Although the case itself is not identical to Appellant's, there are certain questions discussed therein which are perhaps pertinent to the decision regarding

whether or not to note jurisdiction herein.

Whereas the complaining parties in Richardson are black law school graduates who failed the South Carolina bar examination, Appellant herein is a "white," fifty-four (54) year old grandmother and civic activist,as well as a law school graduate,who has twice failed the Maryland bar examination.

In Richardson, the United States Court of Appeals, Fourth Circuit (which would have had jurisdiction over Appellant's case had Appellant gone the United States District Court route) held that South Carolina bar examiners acted arbitrarily and capriciously, in violation of both due process and equal protection clauses of the Fourteenth Amendment in failing two black bar applicants, where there was no consistently applied distinction between failing applicants' scores and scores of

passing applicants who had lower cumulative totals and not obviously different configuration of scores, and where there was no review of applicants' performance other than examination of pattern of grades and whatever notes examiners may have made concerning each paper

The Court of Appeals, in that opinion, directed the district court, on remand, to order that two of the appellants be certified as having passed the South Carolina bar. (pages 750-52)

The Richardson case demonstrates the point that bar examiners' decisions are not infallible, that their grading may be sometimes capricious and arbitrary.

In the Fowler case, now before this Court, Appellant complains that the lack of due process prevents her from discovering whether similar arbitrariness and capriciousness may have influenced her bar examination grades.

The South Carolina Examiners contended that no review procedure was needed because the right of reexamination satisfied the requirements of due process. The same view was announced in Tyler v. Vickery, 517 F.2d 1089 (5th Circuit, 1975) cert. denied, 96 S. Ct. 2660, and in Whitfield v. Illinois Board of Law Examiners, 504 F. 2d 474 (7th Circuit, 1974).

But the Fourth Circuit (1976) declared:

> To our knowledge, a person is not required by any state to repeatedly demonstrate his competence to practice law. The rule is: once is enough. And the reason for the rule is that it takes work, effort, and nowadays, money to prepare for a bar examination. Moreover, the license is deemed of sufficient value that delay in getting it is an injury.
>
> It is true that some courts have held that reexamination is a more effective remedy than review because the administrative burden of allowing challenges was perceived to be too great. We are not persuaded.

The Fourth Circuit reasoning is most appropriate in Appellant's situation where

she entered law school when she was fifty (50) years old, graduated when she was almost fifty-three, and is fifty-four now. If she is compelled to take the examination over and over again, without knowing what her"mistakes", if any, are, then she could easily be of retirement age when she finally"passes" to the Board's satisfaction. For her, time is of the essence. Appellant believes that the due process provided by the Fourteenth Amendment to the United States Constitution is not due process delayed.

It appears that there is a conflict between the opinions rendered by the 5th, 7th, and 4th Circuits regarding due process as it relates to post bar examination review. The issue must be ultimately decided by this United States Supreme Court. Flora Daun Fowler, Appellant herein, prays that it will be determined now, in this case.

Respectfully submitted,

Flora Daun Fowler

Flora Daun Fowler
9410 Woodberry Street
Seabrook, Maryland 20801

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77 - 801

FLORA DAUN FOWLER, *Appellant*

v.

MARYLAND STATE BOARD OF LAW EXAMINERS, Appellee

PETITION FOR REHEARING

FLORA DAUN FOWLER
9410 Woodberry Street
Seabrook, Maryland 20801

IN THE SUPREME COURT OF THE

UNITED STATES

FLORA DAUN FOWLER,

Appellant

v.

MARYLAND STATE BOARD OF LAW EXAMINERS,

Appellee

PETITION FOR REHEARING

The appellant herein respectfully moves this Court for an order (1) vacating the dismissal of the appeal entered on January 23, 1978, and (2) granting this petition. As grounds for this motion, appellant states the following:

1. Maryland's Resolution of Another Equal Protection Challenge.

On December 12, 1977, after the filing on December 5, 1977 of appellant's Jurisdictional Statement, the Maryland Court of Appeals

faced another equal protection challenge and struck down an obscenity statute, the State's Obscene Matters Act, because it violated the Fourteenth Amendment of the United States Constitution.

The Maryland Court held the act as one which was discriminatory in proviaing penalties for clerks who distribute obscene materials in adult bookstores,but not providing penalties for projectionists who operate pornographic films in movie theaters.

The Court of Appeals found such unequal treatment repugnant to the constitutional provisions for equal protection. In finding the exemption of projectionists unconstitutional, it voided the entire statute, leaving the State with no obscenity regulations at all.

The opinion in Wheeler v. State of Maryland, No. 66, September Term, 1977, has not yet been reported, but was set forth inthe

Daily Record of December 20, 1977, a copy of which has been lodged with the filing of this petition for rehearing. (See pages 2 & 3). The unconstitutional provisions were found in Sections 417 (2) and 418 of Maryland's Obscene Matters Act, Maryland Code (1957, 1976 Replacement Volume) Article 27.

Judge Orth, who wrote the opinion, stated:

> Equal protection analysis requires strict scrutiny of legislative classification when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class. (Emphasis added.)

When fundamental rights or a suspect class are involved, the classification must be subjected to close judicial scrutiny and must be justified by a compelling state interest.(Emphasis added.)

Equal protection does not require that all persons be dealt with identically, but it does require that a distinction must have relevance to the purpose for which the distinction is made. Baxstrom v. Herold, 383 U.S. 107, 111, 86 S. Ct. 760 (1966).

Compliance with the equal protection clause requires that legislative

> classification rest upon some ground of difference having a fair and substantial relation to the object of the legislation.
>
> If all persons who are in like circumstances or affected alike are treated under the laws the same, there is no deprivation of the equal protection of the law. Conversely, a law which operates upon some persons or corporations, and not upon others like situated or circumstanced or in the same class is invalid.

In Wheeler, the Court held that to be valid the exemption of the motion picture theatre employees would have to rest upon some ground of difference having a fair and reasonable relation to the prohibition against the publicatio printing, sale and distribution of obscene matter, or have a rational relationship to the legitimate state purpose.

In Fowler, the constitutionality of the Rules Governing Admission to the Bar requires that the different treatment of bar applicants have a fair and reasonable relation to the State's purpose of requiring character and competency standards

for admission to the bar, presumably for the protection of the public.

Appellant, Flora Daun Fowler,contends that the exemption of bar applicants from the privilege and right to a hearing where their competency is at issue, bears no fair and rational or reasonable relationship to the statutory purpose of qualifying new attorneys, and is therefore violative of the equal protection clause.

In Maryland State Board of Barber Examiners v. Kuhn, 312 A2d 216, 270 Md.496, 1973, the Maryland Court of Appeals held that a statute prohibiting cosmetologists from cutting and shampooing male hair in the same manner as they cut female hair did not bear a real and substantial relation to the objective of protecting the male public from inadequate training and inferior hygienic standards, and thus was violating the equal protection clause when the very same services were rendered

to female customers for whom such services were admittedly adequate.

In that opinion, Judge Levine stated:

> Nevertheless, if a statute purporting to have been enacted to protect the public health, morals, safety and welfare has no real or substantial relation to those objects or is a palpable invasion of rights secured by fundamental law, it is our duty to so adjudge and thereby give effect to the Constitution. (Emphasis added.)
>
> The decisive question, then, is whether the means selected here bear a real and substantial relation to the object sought to be obtained. We think they do not.

There is the same question arising in Fowler. The exemption of one group of bar applicants, from procedures granting a hearing and opportunity to confront those whose words deprive them of their livelihood, has no real relation to the object of qualifying attorneys for the protection of the public.

The same Court of Appeals which found a duty to decide the constitutional questions in Wheeler and Maryland Board of Barber Examiners v. Kuhn, supra, shirked that duty in the instant case.

2. The Question on the Merits is Open to Possible Contentions Because it has not Been Previously, Specifically and Adversely Ruled Upon as to Absolutely Foreclose Further Contention on the Subject.

In Equitable Life Assurance Society v. Brown, 187 U.S. 308, 311, the Court stated that:"- - - the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has been so specifically and adversely ruled on by the court as to absolutely foreclose further contention on the subject."

The Fowler claim is not a frivolous one nor is it made for purpose of delay. Nor yet does it present a question upon

which this Court has foreclosed possible contentions by an explicit previous decision. The constitutionality of the Rules Governing Admission to the Bar of Maryland has not been heretofore presented to this Court,nor has the precise question of the treatment of different members of the class of bar applicants been ruled upon.

> The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is per se and inherently Federal. Swafford v, Templeton, 185 U.S. 487, 493.

The subject matter of the Fowler claim is the constitutionality (or rather the lack of it),"per se and inherently Federal", of a state statute or rule.

Can a statute or rule constitutionally give to certain members of a class (bar applicants) constitutional protections which are withheld from other members of the same class,as it does in Rule 12(b) of the Maryland Rules Governing Admission to the Bar?

In dismissing Briggs v. Louisiana State Bar Association, 374 U.S. 96, 83 S.Ct. 1690 (1963) for want of a substantial federal question,this Court may have foreclosed further argument upon the question of whether the lack of any post-examination review is an unconstitutional denial of due process. That is not the issue in Fowler.

The question in Tyler v. Vickery , 517 F.2d 1089, cert. den. 426 U.S. 940 (1975) was whether the bar examination in Georgia was intentionally discriminatory by virtue of the number of black applicants who failed it. No such question arises in Fowler.

The Court's promises of procedural due process, as discussed in Schware v. Board of Bar Examiners of New Mexico, 353 U.S. 232, in Willner v. Committee on Character and Fitness, 373 U.S.96, and Konigsberg v. State Bar of California , 352 U.S. 252, apparently, while the lang-

uage seemed to include all bar applicants, applied only to those applicants whose character was questioned, not to those whose compentency was an issue.

Justice Goldberg, in his concurring opinion in Willner, supra, (joined in by Justice Brennan and Justice Stewart) stated:

> The constitutional requirements in this context may be simply stated: in all cases in which admission to the bar is to be denied on the basis of character, the applicant, at some stage of the proceedings prior to such denial, must be adequately informed of the nature of the evidence against him and be accorded an adequate opportunity to rebut this evidence. (Emphasis added.)

The customarily narrow ruling of the Court then,and in the earlier cases,did not address itself to denial on the basis of competency,as demonstrated by performance on the essay type bar examination.

The above-mentioned decisions do not, and should not, foreclose further arguments to the questions raised by Flora Fowler.

Because of the exemption in Rule 12 (b) of the Maryland Rules Governing Admission to the Bar,and because Maryland provides a limited review of examination papers, the question within the major issues raised is: Where does equal protection end and where does due process begin?

Where a review of sorts has been provided, must that review conform to the ordinary standards of due process?

3. Dismissal of This Case is not in Harmony With the Court's Prior Decisions.

In the face of the dismissal of this case, for appellant, Flora Daun Fowler, the opinion in Goss v. Lopez, 419 U.S. 565,has a hollow ring and a mocking echo.

> Children do not shed their constitutional rights at the schoolhouse door, the 14th Amendment, as applied to the states, protects the citizen against the state itself and all of its creatures, boards of education not excepted.

In Goss, an Ohio statute which permitted a hearing for a student who was expelled but allowed none for a student who was suspended, was held to be unconstitutional. A ten day suspension from school was found not to be de minimis, and neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation was so insubstantial that suspensions could be constitutionally imposed by any procedure the school chose, no matter how arbitrary.

Yet bar applicants,who question the accuracy of the grading of their examinations for the bar,are compelled to "shed their constitutional rights" at the bar examiners' door, no matter how capricious and arbitrary that grading might be.

Even a schoolchild who fails a test is ordinarily entitled to be told why he failed. Not so for the bar applicant- he may only guess as to the reasons for his

failure by inspecting his own unmarked and ungraded examination papers,and by examining model answers which may not contain all the answers to a given question and which,upon occasion, may contain the wrong answers.

As a consumer of services for which he has paid a goodly sum and exerted a tremendous effort, he receives a"package" with no listing of its"ingredients." A purchaser of a can of beans is better protected.

In Morey v. Doud, 354 U.S. 457, a state regulatory statute which exempted the American Express Company from the provisions of the act was held violative of the equal protection clause of the 14th Amendment because the discrimination had no reasonable relation to the purpose of the act which was to protect the public when dealing with currency exchanges.

The Maryland Rules Governing Admis-

sion to the Bar are for the protection of the public when dealing with attorneys in Maryland.

> When it has been determined by the Court that a candidate is qualified to practice law and is of good moral character, an order shall be passed directing that he be admitted to the bar. (Article 10, Section 10, An. Code of Maryland)

The Morey Court stated that a statutory discrimination must be based on differences reasonably related to the purpose of the act in which it is found.

There is no such reasonable basis for a discrimination in the Maryland Rules Governing Admission to the Bar.

The public is entitled as equally to be protected from incompetent attorneys as from immoral ones. And bar applicants should be equally provided with an opportunity to rebut either condition which may preclude them from the practice of law.

In Stanley v. Illinois, 405 U.S. 645 (1972), this Court held that the denial of a hearing, on fitness, to unwed

fathers, as accorded to all other parents, constituted a denial of due process. Again, in Eisenbladt v. Baird, 405 U.S. 438, this Court held that a Massachusettts statute which provided dissimilar treatment for married and unmarried persons, similarly situated, in the distribution of contraceptives, violated the equal protection clause.

> If a state statute impinges upon fundamental freedoms protected by the Constitution, the statutory classification must, under the Equal Protection Clause, be not merely rationally related to a valid public purpose, but necessary to the achievement of a compelling state interest.

In Dunn v. Blumstein, 405 U.S. 330, this Court stated:

> Under the strict scrutiny Equal Protection test which invalidates a statute unless the state can demonstrate that such statute is necessary to promote a compelling government interest, the state bears a heavy burden of justification and the statute will be closely scrutinized in light of its asserted purpose.

In dismissing this appeal the United States Supreme Court has relieved the State of Maryland from carrying the burden of such a justification.

The court, in Keenan v. Board of Law Examiners of the State of North Carolina, 317 F. S. 1350 (1970) stated:

> In licensing attorneys there is but one constitutionally permissible state objective: the assurance that the applicant is capable and fit to practice law.

So it is in Maryland. Any statutory distinction made between bar applicants, which discriminates against some of them, and has no reasonable relation to the objective of the rules, is violative of the Equal Protection Clause, and as a consequence of such discrimination, the Due Process Clause is violated as well. Under those Rules, the fundamental rights of Flora Daun Fowler have also been violated.

Retaking a bar examination does not satisfy the requirements of equal protection or of due process. Appellant is claiming that there was no basis for the finding that she failed to pass the bar examination in February of 1977. In her Exceptions and Addendum thereto she explained her position. (Exceptions and the Addendum are part of the record which was filed at the same time Flora Fowler's Jurisdictional Statement was filed in this Court.)

Taking another examination does not answer the question of whether the previously taken examination was improperly or mistakenly graded, or whether the Board's own answers were wrong or not supported by law in the State of Maryland. Nor would a retake resolve or "cure" such errors or defects in grading should they exist, or make up for the time lost from the practice of law.

The post bar examination procedure described in Harper v. District of Columbia Committee on Admissions, 375 A.2d 25, 26, (1977) more clearly satisfies

due process requirements than does re-taking an examination.

> Upon request, the applicant may meet with the Secretary to the Committee for a review of his essay paper and the questions as framed by the examiners and the examiners' comments with respect to each question. An unsuccessful applicant may submit within a fixed time, without identifying himself, a petition for regrading to each examiner he wishes with supporting reasons. The Secretary must submit to each examiner so petitioned, the petition, the petitioner's examination book and the examiner's questions and comments with respect to such questions. The unsuccessful applicant is notified by the Secretary of the examiner's ultimate disposition of his petition for regrading and the applicant may obtain, upon request, finally a review of the regrading petition and the examiner's disposition thereof by two other members of the Committee.

Under these provisions an applicant has an opportunity to be heard and to be given reasons for the examiner's grades (the notice requirement). It is not impossible for Maryland to initiate a similar system or at least one more similar to the provisions available where one's character

is at issue.

Appellant,Flora Daun Fowler, apologizes to the Court for the lengthy petition, but she felt it necessary to say all these things, and so she said them.

CONCLUSION

For the foregoing reasons, Flora Daun Fowler petitions this Court to grant rehearing, vacate the order of dismissal and review the judgment below; and allow the appellant to attempt to persuade this Court that, as a bar applicant, she is as much entitled to equal protection and due process of the law as the schoolchildren in Goss, the unwed fathers in Stanley, the currency exchanges in Morey, the unmarried persons in Eisenbladt, the cosmetologists in State Board of Barber Examiners, and the pornographers in Wheeler.

Respectfully submitted,

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